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IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 58

WILLIAM LUDWIG ULLMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

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Amendments to the Constitution, that it cannot be impaired by legislation designed to compel testimony. The Guild therefore, with the consent of the parties, presents this brief to the Court.

ARGUMENT:

POINT: The self-incrimination clause of the Fifth Amendment is a bar to a compulsory testimony statute.

I. The plain wording of the Fifth Amendment precludes Congress from compelling self-incriminating testimony.

The constitutional provision distinctly declares that a person shall not "be compelled in any criminal case to be a witness against himself". Legislation cannot detract from the privilege afforded by the Constitution. It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal proceeding to *be a witness against himself, unless it should be provided* by statute that criminating evidence extracted from a witness against his will should not be used against him." *Counselman* v. *Hitchcock*, 142 U. S. 547, 564-5.

The authors of the Bill of Rights were painstaking writers, and where they intended exceptions and provisos to be engrafted, they were careful to add them. In a later clause of the Fifth Amendment, for example, they wrote: "nor shall private property be taken for public use". They might well have stopped there, leaving it to the courts to make the reasonable inference that the prohibition could be avoided if the injured person were but fully indemnified. Had they stopped there, justification of a compulsory testimony statute might follow by similar inference. But the condemnation clause continues, to make the condition of avoidance most explicit: "nor shall private property be taken for public use, *without just compensation.*" (Emphasis added.)

It is reasonable to infer that the spelling out of the proviso in the one clause and its omission in the other were both deliberate and meaningful. The distinction is far from accidental. In return for the condemnation of property, equivalent monetary indemnification could reasonably be provided. A man may be expected, for the public good, to relinquish one parcel of land in exchange for the money to buy another of equal value.[1] But if a man's reputation is condemned in the public interest, no compensation, in the form of immunity or otherwise, will buy another. While fire insurance may provide equivalent value for property destroyed by fire, life insurance hardly plays a similar role.

The dissenting Justices in *Brown* v. *Walker*, 161 U. S. 591, recognized this when they said, at p. 610:

> "It is too obvious to require argument that, when the people of the United States in the Fifth Amendment to the Constitution, declared that no person should be compelled in any case to be a witness against himself, it was their intention, not merely that any person should have such immunity, but that his right thereto should not be divested or impaired by any Act of Congress."

The Constitution does not, of course, prevent a person from waiving the privilege, nor does it preclude Congress from offering immunity as an incentive to such waiver. *Adams* v. *Maryland*, 347 U. S. 179 (1954); *McCarthy* v. *Arndstein*, 266 U. S. 634, 642. Indeed, such need as a grand jury may have to obtain self-incriminating informer testimony can be served most adequately by offers of immunity voluntarily accepted in exchange for evidence on the basis of which others can be prosecuted.

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[1] It should be noted that even the proviso of the condemnation clause is strictly construed in favor of the owner of condemned land. In determining the measure of "just compensation", "the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered * * *." *Olson* v. *U. S.*, 292 U. S. 246, 255.

The benefits of a grant of immunity can in turn be waived, and *Regan* v. *New York*, 349 U. S. 58, holds no more than this.

But the Constitution does not permit the compulsion of testimony in exchange for an immunity neither sought nor accepted, for "compulsory discovery * * * is contrary to the principles of a free government. It is abhorrent to the instincts * * * of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Boyd* v. *U. S.*, 116 U. S. 616, 631-2. As Mr. Justice Black, dissenting in *Regan* v. *N. Y.*, *supra*, at p. 67, said: "The Fifth Amendment accords an unqualified privilege to be silent when asked questions answers to which would make those persons witnesses against themselves. *See, e.g., Blau* v. *U. S.*, 340 U. S. 159, 161."

Brown v. *Walker*, *supra*, and the line of cases which followed it are, we know, to the contrary. "But the ultimate touchstone of constitutionality is the Constitution itself and not what we [the Court] have said about it." *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, concurring opinion, 487, at 491-2.

The Court should therefore reconsider and repudiate the doctrine of the *Brown* case.

II. The history of the privilege demonstrates that the clause was designed to guard against compulsory confessions of political and religious "heresy".

From the naked words of the Fifth Amendment, and as no more than a student-exercise in statutory construction, we can conclude that the privilege was intended to confer an unqualified right to silence where answers might tend to incriminate the witness. But with a wealth of history behind the clause, we can find added support for the principle which the words so clearly proclaim.

If the privilege could be said to have a single spiritual father, the choice would fall upon John Lilburn, whose trial (1637-45) focussed the attention of the whole of England upon the evils of the Star Chamber and High Commission proceedings. Lilburn's stubborn refusal to take the oath and to be a witness against himself was no isolated act of individual protest, but was representative of a growing rebellion on the part of hundreds of others. Protest was strong enough, among those who stayed in England, to accomplish the demise of the Star Chamber and the Court of High Commission in 1641 and by the early 1650's the privilege was so well established in the customary laws of England that no English Parliament thought it necessary to pass legislation to ensure it.[2] The determination to outlaw forced confession was even stronger among those who fled to the colonies to escape persecution for political and religious dissent, so that a maxim which remained "a mere rule of evidence in England became clothed in this country with the impregnability of a constitutional enactment." *Brown* v. *Walker*, *supra*, at p. 597. And even prior to 1789 seven American state constitutions guaranteed the privilege against self-incrimination.[3]

It is customary to explain and justify the privilege by saying that it "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed." *Feldman* v. *U. S.*, 322 U. S. 487, 489. The authors of the Bill of Rights would not have rejected this formulation, but it is doubtful that it truly reflects their reasoning or their purpose. They would hardly have voiced the truism that the privilege is for

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[2] R. Carter Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. R. 763; 770-4.

[3] Id. at 765.

the innocent as well as the guilty. For they were not primarily concerned with procedural safeguards for those suspected of involvement in ordinary crime. Their concern was indeed for the "guilty"—those "guilty" of dreaming of the death of the King, those "guilty" of heretical thoughts. Their effort was to give not merely procedural protection, but to afford to the dissenter full immunity from punishment for the crimes of religious heresy and treasonable thoughts. They knew that heresy—political or religious—is hard to detect and prove. There is no corpus delicti, no scene of the crime. A search of the suspect's home or work-place yields, at best, only books and papers. Unless the heretic can be forced to confess (or his brother-dissenter to inform upon him), his "crimes" may well go undiscovered and unpunished. The Fifth Amendment, by forbidding compulsory testimony, would, they thought, make it impossible to convict anyone for his religious or political beliefs and associations.

The history of the privilege was lost sight of for many years, during which the whole concept of religious and political crime was unknown in American law. In American law of the past 100 years or more the privilege has been the refuge, in the main, of persons suspected of common crimes. It has been used to avoid confessions of connection with narcotics peddling, tax evasion, gambling, illegal distillation of whiskey, bribery, graft and the like.[4] It is only in the last five or six years that the privilege has again become associated with questions concerning political belief and affiliation, and this is largely due to the diminished vigor, under recent court interpretations, of the First Amendment in its intended role as guardian of political freedoms.

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[4] The leading federal cases are all concerned with common crime: See e.g., *U. S. v. Zwillman*, 108 F. 2d 802 (2d Cir., 1940) (violation of liquor law); *U. S. v. Weisman*, 111 F. 2d 260 (2d Cir., 1940) (violation of narcotics laws); *Smith v. U. S.*, 337 U. S. 37 (OPA violations); *Feldman v. U. S.*, 322 U. S. 487 (using mails to defraud); *Regan v. New York*, 349 U. S. 58 (bribery); *Heike v. U. S.*, 227 U. S. 131 (conspiracy to commit fraud), etc., etc.

The First Amendment and the privilege against self-incrimination of the Fifth Amendment share a common heritage and a common purpose. (It is no accident that the crime which John Lilburn refused to confess was that of printing heretical and seditious books.)

Because of the failure of the courts in *Lawson* v. *U. S.*, 176 F. 2d 49, cert. den. 339 U. S. 934 (1950) and other cases[5] to uphold the right of witnesses, under the First Amendment, to refuse to testify before congressional committees as to political belief and affiliation, the Fifth Amendment privilege has been called upon to perform its original dual function.

Today it is the political dissenters again who are the targets of attempts to compel self-incriminatory testimony. The Immunity Act (18 U. S. C. § 3486) was originally proposed (S. 16 and H. R. 6899, 83rd Cong.) as a bill to permit the compelling of testimony as to *any* type of crime. But the Act was narrowed, before passage, to apply only with respect to investigations "relating to any interference with or endangering of * * * the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of the Government by force or violence." It was aimed directly at investigation of Communism.[6] The attempt is thus made to destroy the efficacy of the privilege in precisely the area—political dissent—in which it was designed to offer protection.

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[5] *Barsky* v. *U. S.*, 167 F. 2d 241, cert. denied 334 U. S. 843 (1948); *U. S.* v. *Josephson*, 165 F. 2d 82, cert. denied 333 U. S. 838 (1948), rehearing denied 339 U. S. 971 (1950).

[6] The amendment was explained to Congress by Rep. Keating, the sponsor of the bill in the House, as follows: "* * * this bill as now worded and now before us exclusively applies only to investigations dealing with or prosecutions for the crimes treason, sabotage, espionage, sedition, seditious conspiracy, and violations of certain specific statutes, *all of which deal with Communist conspiracy*" (100 Cong. Rec. Daily Ed. 12603, Aug. 4, 1954). (Emphasis supplied.)

III. The *Counselman* v. *Hitchcock* formula—equivalent legislative protection—cannot be achieved.

It is curious that the leading case in which the Court refused to punish a witness who declined to answer self-incriminating questions in the face of an offer of immunity should, through dictum, set the pattern and the doctrine for later incursions into the privilege. The Court, in *Counselman* v. *Hitchcock*, 142 U. S. 547, found that the statute before it afforded insufficient protection to offset the constitutional privilege. But, lacking the self-restraint which is so dominant a characteristic of the Court today, it went on to say, at p. 585:

> "It is quite clear that legislation cannot abridge a constitutional privilege and that it cannot replace or supply one, *at least unless it is as broad as to have the same extent in scope and effect.*" (Emphasis supplied.)

Down through the years, lip service has been paid to this so-called doctrine of *Counselman* v. *Hitchcock*: "The immunity, of course, is required to be complete, that is to say, in all respects commensurate with the protection guaranteed by the constitutional limitation." *Glickstein* v. *U. S.*, 222 U. S. 139, 141.[7]

And yet the earliest and the leading case which sanctioned a contempt conviction under a compulsory testimony statute recognized at once the impossibility of meeting this condition. In *Brown* v. *Walker*, *supra*, the Court said, at p. 605:

> "It is entirely true that the statute does not purport, nor is it possible for any statute, to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime."

[7] To the same effect, *Smith* v. *U. S.*, 337 U. S. 137, 150; *Heike* v. *U. S.*, 227 U. S. 131; *U. S.* v. *Monia*, 317 U. S. 424, 428, etc.

Nonetheless, the Court found the statute adequate as a substitute for the constitutional protection, saying:

> "A person who commits a criminal act * * * ought not to call upon the courts to protect that which he has himself esteemed to be of such little value * * * ."

Even if we were to accept this curious rationale, which ignores the established principle that neither the tender nor the acceptance of immunity affords any ground for an inference of guilt, *Burdick* v. *U. S.*, 236 U. S. 79, 94, we would still assert that times and circumstances have changed since *Brown* v. *Walker* and that the sanctions which are imposed today and against which the immunity grant offers no protection are of an order different from "disgrace" or "opprobrium". We shall do no more than summarize the portion of the brief of petitioner in the Court below, quoted in the Circuit Court's opinion, 221 F. 2d 760, 761-2, fnote 1 (2d Cir., 1955), where the numerous disabilities faced by persons admitting to Communist Party membership are set forth: possible exposure to prosecution under state law, loss of employment by government and private industry, impossibility of obtaining and retaining certain business and professional licenses, forfeitures of public housing accommodations, refusal of passports, denaturalization and deportation and, we might add, deprivation of the right to a place on the ballot after compliance with all local law, *Salwen* v. *Ries*, 16 N. J. 216 (1954). The list is impressive and cannot be ignored.

We shall not repeat this argument but would rather stress that the witness who is asked whether he is a member of the Communist Party or affiliated therewith is confronted with two further hazards, whether he answers "yes" or "no." Against these hazards, the Immunity Act offers no shield. If he answers "no", he faces prosecution for perjury on account of the compelled testimony itself; if he answers "yes", he may be indicted for continuing participation in a criminal conspiracy.

In granting immunity from prosecution on account of the compelled testimony, the Act specifically excepts "prosecution for perjury * * * committed while giving testimony * * * under compulsion * * *." (18 U. S. C. 3486(d)). And such a provision is, of course, valid and is even implied where not expressly included. *Glickstein* v. *U. S.*, 222 U. S. 139.

It is easy to concede that a grant of immunity is not a license to lie under oath. But in an era when the informer-witness is legion (and his tendency to perjury is notorious[8]) and when the concept of what constitutes "membership" in the Communist party is as ephemeral as the court decisions and statutes have caused it to become,[9] the question is not so much whether the witness has lied under oath as whether other witnesses can be found to contradict his testimony.

Commenting on an immunity statute, which contained a similar provision, the dissenting Justices in *Brown* v. *Walker*, *supra*, at p. 622 said of the witness whose testimony was to be compelled:

> "If he declines to testify on the ground that his answer may incriminate himself, he is fined and imprisoned. If he submits to answer, he is liable to be indicted for perjury. * * *. His position in this respect is not that of ordinary witnesses testifying under the compulsion of a subpoena. His case is that of a person who is exempted by the Constitution from testifying at all in the matter. He is told, by the Act of Congress, that he must nevertheless testify, but that he shall be protected from any prosecution, penalty or forfeiture by reason of so testifying. But *he is subjected to the hazard of a charge of perjury, whether such charge*

[8] See, e.g., the comments of Judge Dimock on the informer Harvey Matusow, whose perjured testimony was used to convict defendants in a Smith Act prosecution; *U. S.* v. *Flynn*, 30 F. Supp. 413 (U. S. D. C. S. D. N. Y., 1955).

[9] See *infra*, pp. 11-12.

be rightfully or wrongfully made. It does not do to say that other witnesses may be so charged, because if the privilege of silence, under the Constitutional immunity, had not been taken away, this witness would not have testified and could not have been subjected to any charge of perjury." (Emphasis supplied.)

There is even reason to believe that the possibility of prosecuting the witness for perjury, through the use of informer witnesses, may be the main reason for calling a witness and compelling his testimony under a grant of immunity. Certainly this purpose has been publicly avowed as a reason for calling witnesses before a Senate subcommittee. Senator McCarthy, urging his subcommittee to subpoena certain witnesses in the course of an investigation, said:

> "As to Field, Browder, Jaffe and Stachel—I'd either make them indict themselves or perjure themselves" (N. Y. Journal-American, April 21, 1950, as quoted in *U. S. v. Jaffe*, 98 F. Supp. 191, 195 n. 3 (D. C., D. C., 1951).

That this reasoning is neither fanciful nor hypothetical can be further demonstrated by noting the frequency with which indictments *for perjury* have in fact been brought against Communists and "subversives" who presumably could not, for lack of proof, be prosecuted for any substantive crime. *Hiss, Remington, Lattimore, Bridges, Neff, Gold, Christoffel* and many others are in this category.

Witnesses who are asked questions concerning membership in or affiliation with the Communist Party are also confronted with the difficult task of determining what the true answer to the question may be. The meaning of the term membership has never been easy of definition (see, e.g., Instructions to the Jury in the Bridges Perjury Trial, 10 F. R. D. 81, 96, and the charge to the jury in the first *Remington* case as discussed in *U. S. v. Remington*, 191 F. 2d 246, 248 (2d Cir., 1951). The term has been legislated out of all rational meaning by the Communist Control Act

of 1954 (68 Stat. 775), where fourteen criteria of membership are set forth in Section 5, ranging as far afield as "whether the accused person * * * (12) has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes of the organization."

Where the question concerns not "membership" but "affiliation" the waters are muddied even more hopelessly. See *Bridges v. Wixon*, 326 U. S. 135, 141-8. The nature of a perjury indictment based on conflicting testimony as to this type of "sympathy" and "affiliation" was well illustrated in *U. S. v. Lattimore*, 112 F. Supp. 507 (D. C., D. C. 1953).

We turn finally to the question of the effect of a grant of immunity upon self-incrimination for continuing crimes. It is the general rule that immunity protects the witness from past but not from future crimes. *U. S. v. Bryan*, 339 U. S. 323, 340-1 (1950). See *U. S. v. Kahriger*, 345 U. S. 23 (1953), where the court said at p. 32:

> "Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed."

Insofar as offenses committed subsequent to compelled testimony are new substantive crimes, the witness can, of course, be prosecuted for them. And this is true even where the subsequent crime arises from the continuation of a course of conduct testified to under a grant of immunity. *U. S. v. Frontier Asthma Co.*, 69 F. Supp. 994 (D. C., W. D. N. Y., 1947).

The same rule has been applied to participants in a continuing conspiracy. In the famous Beef Trust cases, certain packers who had testified against themselves under a grant of immunity in the 1904 investigation of the Corporations Comm'r, and whose claim of immunity was sustained

in *U. S. v. Armour*, 142 F. 808 (D. C., N. D. Ill., 1906) were indicted in 1910 for the same conspiracy upon evidence gained through leads given in their self-incriminating testimony. The Court, in *U. S. v. Swift*, 186 F. 1002 (D. C., N. D. Ill., 1911), refused to quash the indictment, saying at pp. 1015-16:

> "The indictments in this case are not for any crime committed at the time the privileged evidence was given but for a subsequent crime, and that subsequent crime consists in the continuation of the original agreement * * *. I cannot agree that the immunity act purposely was made attractive as a kind of bonus or bribe to induce innocent disclosures by the promise that a future crime concerning the acts, transactions and things testified about would pass unpunished."

The Court further said, at pp. 1017-18:

> "There is no legal reason why those facts [about which defendants testified under the immunity grant] or the evidence concerning them * * * may not be used to trace the history of, or establish, an unlawful conspiracy charged to have been in operation in 1910 * * *. They must still exist as facts, harmless and pure to be sure, but still tangible facts; and these facts * * * may be shown at any time, in any action, civil or criminal * * *."[10]

A somewhat comparable situation was presented in *U. S. v. Smith*, 206 F. 2d 905 (3d Cir., 1953). Defendant had testified in April, 1946, under an immunity grant, confessing violations of OPA regulations with respect to sales at over-ceiling prices. His immunity from prosecution for these violations was upheld in *Smith v. U. S.*, 337 U. S. 37.

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[10] For an illuminating analysis of these cases see Robert G. Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 Geo. Wash. L. R. 447, 570, at pp. 571-2 (1954). See also Annotation in 157 A. L. R. 428 (1945); at 433 ff. Cf. *U. S. v. Feldman*, 136 F. 2d 394 (2d Cir., 1943), aff'd in 322 U. S. 487 (1944), as commented on in 157 A. L. R. 428, 431.

One month later he was subpoenaed to testify before the Internal Revenue Bureau and in October, 1946 he testified concerning revenues derived from these same sales. In a prosecution for willful evasion of income tax payment for 1946 he pleaded the immunity grant in bar, offering to prove that his testimony concerning OPA violations had served as a lead toward the discovery of the tax violation. The defense was disallowed and his conviction upheld on the ground that, whether or not his immune testimony had served as a lead, the grant of immunity was no defense against crimes not yet committed when the testimony was given. He had testified in 1946 and his tax return for the year 1946 was not due until March 1947. The crime was therefore committed in 1947 and the immunity granted in 1946 could not serve as a bar. See also *Heike* v. *U. S.*, 227 U. S. 131.

This may not be settled law, and there is one case squarely to the contrary. *U. S.* v. *Moore*, 15 F. 2d 593 (D. C., D. Ore., 1926). But the principle announced by these cases, particularly in the light of *U. S.* v. *Kahriger*, *supra*, serves at least to cast serious doubt on the scope of the immunity granted in respect to testimony admitting violations of the Smith Act and the Subversive Activities Control Act. Under the Smith Act (18 U. S. C. 2385), both under the conspiracy and the membership provision, membership in the Communist Party is an element of the crime; while under the Communist Control Act of 1954 the criteria by which membership is to be determined are such as to make it virtually impossible for a person who has once admitted membership to sustain the burden of proving that he has severed the relationship and withdrawn from the "conspiracy". Would it not be possible for one who admitted membership under a grant of immunity today to be prosecuted six months hence for the new crime of continuing in the conspiracy?

Under the registration provisions of the Internal Security Act (64 Stat. 987, 50 U. S. C. 786-787) each day of failure to register constitutes a new and separate crime.

If this Court should uphold the determination that the Communist Party must register and list its members, *Communist Party* v. *S. A. C. B.*, 223 F. 2d 531 (D. C. Cir., 1954), now before this Court on certiorari, and if the Party should fail to register John Doe as a member, would not John Doe's failure to register on the day *following* his testimony under an immunity grant subject him to prosecution? And if this be true, are we not faced with precisely the situation condemned by the Court in *Aiuppa* v. *U. S.*, 201 F. 2d 287 (6th Cir., 1952), where the Court said at p. 300:

> "We are unable to give judicial sanction, in the teeth of the Fifth Amendment, to the employment of * * * methods of examination of witnesses constituting a triple threat: answer truly and you have given evidence leading to your conviction for a violation of federal law, answer falsely and you will be convicted of perjury, refuse to answer and you will be found guilty of criminal contempt and punished by fine and imprisonment."

CONCLUSION

In the light of these arguments, we suggest that the time is ripe for a re-examination of *Brown* v. *Walker* and the tenuous basis on which it so lightly tosses aside the full protection of the Constitution. This is the moment for a new and more careful reading of the Bill of Rights, lest the freedoms so hard won be lost again.

Brown v. *Walker* is of an age with *Plessy* v. *Ferguson*, 163 U. S. 537, and should be accorded no greater validity today. Just as the Court said, in reconsidering the *Plessy* case, that it must do so in the light of the present situation in American life, to determine whether the Constitution's promise of equal protection was being fulfilled, so too the Court should ask itself whether, in these days when the Government is encroaching further and further upon po-

litical freedoms, the guarantee of the Fifth Amendment is adequately maintained.

Respectfully submitted,

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